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VIRGINIA LAW REGISTER

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The February REGISTER went to press before the election of a judge of the Supreme Court of Appeals to succeed Judge Keith, whose term expires January 31st, 1917, and

The Appellate Judge Elect. who was not a candidate for re-election. The choice of the General Assembly fell

upon Judge Frederick Wilmer Sims of Louisa. Whilst the REGISTER's choice was for its former editor, Professor William M. Lile, it has no hesitancy in saying that Judge Sims is in every way, personally and professionally, worthy of the honor conferred upon him. He is a gentleman of the highest character, dignified, yet urbane, an able lawyer in the prime of life, with judicial experience and we expect him to ornament the Supreme Bench and add to its value. We feel that his decisions will be worthy of that great tribunal's highest traditions and we extend to him our congratulations, with the hope of a long, successful and useful career.

Our Virginia Supreme Court has held practically that in the construction of wills no hard and fixed rule can be held to apply.

Intention—Not Words—the Ruling Test in Interpreting Wills. In other words that every will, like every tub, stands on its own bottom. The English courts seem to follow that rule, which explains how decisions can be run counter to each other.

In the case of *Duke of Leeds v. Amherst*, decided in 1844, it was held that a picture of the Duke of Schomberg, sitting, clothed in armour, upon horseback, a battle scene in the background, passed under a bequest of "portraits." In *Abbott v. Middleton*, decided in 1858, it was held that the court was

not entitled to surmise what was the testator's intention, but must take the words as they stood. But now in the year 1915, in the case of *Layard v. Bessborough*, Lord Cranworth holds that words are only an indication of meaning and in construing a will must be used "in a different sense from that in which the testator intended to use them," and so a large number of unquestioned "portraits" by old masters did not go to a nephew to whom the testator bequeathed "the portrait of myself and all my family and other portraits."

Under another clause in the will the National Gallery was to be allowed to select from the testator's pictures any they chose except such as were included in the former bequest.

The nephew claimed that the words "other portraits" meant either a portrait painted from a living subject or a replica painted by the same artist or a copy by some other artist of an original portrait, and resisted the efforts of the National Gallery to select thirteen portraits by old masters. But the court held that it was evident the testator intended "portraits" similar in character to "family portraits" and that the portraits painted by dead and gone old masters were not such portraits as the testator intended to bequeath his nephew.

The words "other portraits" would at first glance seem very broad and general and *Duke of Leeds v. Amherst* was certainly very strong authority to sustain the nephew's contention. And yet we believe Lord Cranworth's construction was the right one.

If ever the law was gagged by reason of war it does not seem to us that Mr. Justice Bargrave Deane in the Divorce Division of the English High Court of Justice, gagged it.

Inter Arma.

Leave was applied for to serve a respondent by substituted service.

The matter referred to the wife's maintenance under proceedings against her husband. It turned out that the husband was in charge of a battery in France and the Justice peremptorily refused the order. In vain was it stated that the soldier had counsel. His Lordship replied, "No! no! The wife must put up

with trouble for the sake of the country. She is not the only wife to suffer."

"Suppose the man is killed?" his Lordship was asked, and replied "I cannot anticipate that. It is essential that officers and men at the front should not have their minds distracted from their national duty." It was mildly suggested that the husband owed a duty to his wife as well as his country and that the petition could be served by post; but his Lordship was obdurate. "No; I will not do it. I will not let him be bothered."

Surely this is carrying patriotism to the limit.

At the time we go to press the General Assembly has been in session thirty-seven days, including Sundays. If any legislative enactments of substantial value have been

**The General
Assembly.**

made law they have not been brought to our knowledge. The prohibition measures has been passed and our State subjected to a system in the judgment of many people subversive of the principles of individual freedom. It is the law, however, and every good citizen should see to it that it is rigidly enforced. If it is a good thing its enforcement will prove it, if it is bad, its enforcement will hasten its repeal, and we hope to see the courts and law officers do all in their power to enforce it to the fullest extent, regardless of what their personal views are. Indeed the personal views of courts and law officers should have nothing to do with the enforcement of an act of the law-making body. We believe it will be enforced honestly and fearlessly by our courts and the results of that enforcement will best indicate to the people whether the law is wise or otherwise. There has been the usual flood of amendments to the Code; of acts to amend and re-enact former acts, but the title is all that the general public sees and therefore the value of each bill has to be passed upon by the General Assembly with little aid from any outside source.

It would be an excellent scheme if some way could be devised to have all bills of a public nature printed in the daily newspapers so they could be studied by lawyers and laymen before their enactment into laws. It would help a hard worked body, pressed

for time and attempting to do six months work in sixty days, and might prevent much unnecessary and some foolish legislation.

We are sorry to see a joint resolution has been offered in the General Assembly to provide for the election of judges both Supreme and Subordinate, by the people. We rejoice to see it was defeated.

**Election of
Judges by the
People.**

The argument has been used that there are "log-rolling" and "combinations" in the General Assembly which render elections of the judiciary by that body unwise. "The proof of the pudding is chewing the bag," is the old saying. We challenge any state with a "people elected" judiciary to show a better, higher, cleaner, abler lot of judges than those which today wear the ermine in Virginia.

Take the last contest between Lile and Sims for the Supreme Court Judgeship. The accusation was made of "log-rolling," etc., in that contest. What was the result? What could have been the result? Why no matter which of the two was elected the State would have obtained the services of an upright, able, learned and high-minded lawyer, whose career will do credit to the State and those who elected him. We had our preferences. We would have voted for Professor Lile; but we recognized and recognize the fact that his opponent was in every way worthy of the office to which he was elected, and that neither of these gentlemen would have stooped to do an unworthy act, to have been elected President of the United States. But imagine them on the stump canvassing for an office of such dignity such importance, and one to be separated as far as possible from the clamour of the mob and the soiling of the hustings. Even then neither would have stooped to an act unworthy of their standing; but how many more might have been in the contest. "Log-rolling" and "combinations" may be bad enough, but demagogery and the appeals to the popular demands, to the prejudices and passions of the multitude would be a million times worse. We once witnessed in a neighboring state a joint debate of two candidates for a judicial office (circuit judge) before a large crowd. One

was the incumbent. He bragged of what he had done; he boasted of what he intended to do. He fawned; he begged; he appealed to those in whose favor he had decided cases; he tried to explain away decisions adverse to the popular will. His opponent—who was elected—out-Heroded Herod. He abused his opponent's conduct on the bench; sneered at his decisions; appealed to the "pistol carrying crowd," and the poor fellow sent to jail for selling a "little liquor." He told how he was going to temper justice with mercy; to favor the poor man in his cause and exhibited a touch of temper which gave a fair indication of what he turned out to be—one of the poorest judges ever upon the bench in that circuit. He was re-elected, however, against one of the cleanest, clearest-minded, ablest lawyers we have ever known; but a modest, high-minded man, who made no promises, save that he would try to do his duty as God gave him to see it, and would judge alike the rich and the poor.

Wouldn't something of this sort be likely to occur in some of our circuits? No! The best proof of the wisdom of our present method is the class of men our General Assembly elects. We believe they are better qualified to make better selections than the populace.

The Virginia Bill of Rights contains the well known clause: "That in all criminal prosecution a man hath the right to demand the cause and nature of his accusation, to be confronted with his accusers and witnesses," etc., etc.

**The Right of an
Accused to be
Confronted with
His Accusers and
Witnesses.**

We wonder how this clause would have been construed had the case of *Rex v. See Kun*, which was decided by the English Court of Appeals in December, been heard in one of our courts. He was accused and convicted of the murder of a woman at Limehouse and sentenced to be hanged. He understood no English and the evidence was not interpreted to him. In other words, so far from knowing what the witnesses against him were testifying to, he was in absolute ignorance and might as well have been in China as in the dock. He had coun-

sel who could not speak his language, and no interpreter was called as is the usual custom in such cases.

The Court of Criminal Appeal sustained the conviction on the ground that he was represented by counsel and had no right to call for an interpreter.

Now, had this been in Virginia could such a conviction stand? We do not believe it could or should stand.

The right to be confronted with his accusers and witnesses is to enable the accused to hear what they say, in order that he may be able to meet the charge whereof he is accused. If he does not understand one word of what is said against him and it is not made known to him, is he really confronted with his accusers and witnesses? Is their mere physical presence sufficient to comply with the solemn terms of our fundamental law? We have no case in Virginia and the only case having any likeness to the case in question is *State v. Mannion* (Utah), 45 L. R. A. 638, commented upon in 5 Va. Law Register 637. Here an accused was by order of the court placed twenty-four feet away from the prosecuting witness, where he could not see or hear the witnesses or see the jury, this being done to protect the witness, who was a little girl, from being intimidated by the prisoner. The court held this was error and reversed a conviction. Now the case of the unfortunate Chinaman was almost similar. He was in a position to see the witnesses and jury, it is true, but in reality as far removed from them as if he had been in another room. We, therefore, think a grave injustice was done him, which under our bill of rights would not have been permitted.

It was in West Virginia, we believe, that a process was returned by a Deputy Sheriff—"Not executed on account of a gun." In the

**What Was the
Poor Sheriff
to Do?**

case which we alluded to in the editorial in our February number entitled "Substituted Service on a Married Woman" the return might have been "Not executed on account of a door." Before the substituted service was attempted the Sheriff rode up with the summons and saw the lady upon whom he was to serve it smiling upon him through

an open window. She disappeared when he gallantly doffed his hat and dismounted from his steed. He entered the porch, knocked at the door and no answer came to repeated knocking. He tried to open the door—it was locked. Presently a window opened and the Sheriff saw the husband of the lady smiling upon him. "Good morning, sir," politely said the Sheriff, "Is Mrs. — at home?" "Yes," was the reply, "but this is not her day at home and she is not receiving company." "But," said the Sheriff, "I have a paper I wish to give her." "Thank you, very much," was the reply; "she doesn't need any papers." "But it is a law paper, and I tell you I am an officer of the law and demand this door be opened and I admitted to Mrs. ——'s presence." "This is my house—or rather, Mrs. ——'s house, and she does not wish to see you, sir, or have you enter her house. Sorry to seem rude, but I must bid you a respectful good-bye," and the window was pulled down and the Sheriff stood awhile and then betook himself to his horse and rode away—to return at a later day when the lady had left for another state, and then served the process on the husband with the result heretofore alluded to.

Now, what could the Sheriff have done in this case? He could not have broken open the door to serve the process. He couldn't give it to the husband. He could not post it at the front door, for the lady was "found at her usual place of abode." We suppose he did the only wise thing he could have done—returned home. And yet isn't there a *lacuna* in the law of serving process which would permit such a state of affairs? The result in this case has been an absolute denial of justice, for the married woman cannot be served with process except in person, and access to her is denied when she is in the state, and no substituted service can be had upon her. If the married ladies of the state can only "get wise," their immunity from suit is as good as it was in the days before "one Smith of Nelson," as dear old John B. used to style him, introduced in and had passed by the General Assembly, the Married Woman's Act.

We respectfully suggest that our Revisors take this matter up. And whilst they are at it, might they not provide some method to prevent an obstinate gentleman from barring out of his, or his wife's house an officer of the law armed with legal process to be served on one or the other?

When the women vote many new questions are liable to arise in the law of husband and wife. One of a novel kind has just been decided by the Supreme Court of the United States in the case of *MacKensie v. Hase, etc., Commissioner's, etc.*, upon an appeal from the Supreme Court of California. Women have the right of suffrage in California and Mrs. MacKensie, before her marriage was a legally qualified voter in that State, where she was born and resided. Being such a citizen and resident, she married Gorden MacKensie a native subject and citizen of Great Britain. Mrs. MacKensie after her marriage applied for registration as a voter, but was refused on the ground that by reason of her marriage she took the nationality of her husband and ceased to be a citizen of the United States. Mrs. MacKensie claimed the right to vote both under the State Constitution and the Constitution of the United States. The former gave the right to vote to "every native citizen of the United States" and it was conceded that under the Constitution of the United States every person born in the United States is a citizen thereof. The only question was, did Mrs. MacKensie lose her citizenship by marriage with a subject of Great Britain.

Prior to her marriage the Congress had passed an Act (March 2nd 1907) providing, "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein." [34 Stat. at L. 1228, chap. 2534, Comp. Stat. 1913, § 3960.] Mrs. MacKensie contended that such legislation if intended to apply to her was beyond the authority of Congress, and we think Mrs. MacKensie was right, tho' the Supreme Court decided otherwise. Mrs. MacKensie's right to vote as a *Citizen of California*, was a question solely for the State Court and under the State Constitution. Mr. Justice M'Reynolds, dissenting, held that the Supreme Court was without jurisdiction and we think he was right. It is a curious thing, but the court made no allusion

whatever to this phase of the case. Mrs. MacKensie did not claim to vote as a citizen of the United States, but as a citizen of the Sovereign State of California. The court, however, entered into quite an interesting discussion upon the subject of expatriation voluntary and involuntary. Mrs. MacKensie claimed that she could not be expatriated without her consent and that it must be shown in order to expatriate her that she voluntarily had a fixed determination to change her domicile and permanently reside elsewhere, as well as to throw off the former allegiance and become a citizen or subject of a foreign power. She claims that; "No act of legislature, 'can denationalize a citizen without his concurrence,'" citing *Burkett v. McCarty*, 10 Bush, 758. "And the sovereign cannot discharge a subject from his allegiance against his consent except by disfranchisement as a punishment for crime," citing *Ainslie v. Martin*, 9 Mass. 454. "The Constitution does not authorize Congress to enlarge or abridge the rights of citizens," citing *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204. "The power of naturalization vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away. * * * The Fourteenth Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth declared by the Constitution to constitute a sufficient and complete right to citizenship;" citing *United States v. Wong Kim Ark*, 169 U. S. at p. 703, 42 L. Ed. 910, 18 Sup. Ct. Rep. 456. But the court held that the statute of March 2nd 1907 prevailed and that Mrs. MacKensie was merged in Mr. MacKensie and became identical with him and carries the old common law doctrine to the fullest extent: As part and parcel of MacKensie she was therefore a British Subject.

Counsel for Mrs. MacKensie contended further that both history and report show that the act in question was passed with reference solely to the status of citizens *abroad* and questions arising by reason thereof. But the court declined to hear any such reasons—departing we believe from a rather well settled doctrine in the interpretation of statutes. The court said: "What ever was said in the debates on the bill or in the reports concern-

ing it, preceding its enactment or during its enactment, must give way to its language; or, rather, all the reasons that induced its enactment and all of its purposes must be supposed to be satisfied and expressed by its words, and it makes no difference that in discussion some may have been given more prominence than others, seemed more urgent and insistent than others, presented the mischief intended to be remedied more conspicuously than others." And so Mrs. MacKensie gained a husband and lost her vote. It behooves our Suffragette friends to see to it that this new "restraint upon marriage" is changed before they obtain the vote.